in 1963.[4] Commonly known as the Harris Report, Congress examined the development of television networks and competition. Recognizing that the networks were acquiring "subsidiary" rights to profit sharing and domestic syndication for programs appearing on the network with increasing frequency, [5] the Report recommended, inter alia:

> Also, the Commission under its authority to make special regulations engaged in chain broadcasting, may wish to prohibit networks from engaging in the business of domestic syndication and from acquiring various additional profit-sharing and subsidiary rights in programs which they exhibit on their networks. As we have pointed out in this report, such action would tend to promote the orderly and stable development of independent sources of network programming and tend to permit the development of a broader market for all television programs.[6]

Indeed, the Harris Report recognized the inherent conflict between promoting a network and allowing the networks to continue to acquire financial interest and domestic syndication rights.[7]

In 1965, the FCC again examined the economic dynamics of a network dominated syndication industry and the paucity of competitive syndicated product to compete with network fare. The FCC found:

> This condition, if not corrected, will in our judgment seriously affect further development of our national television service. If it can be assumed that a large number of additional television stations will come into operation in the UHF band through the effect of the all-channel receiver bill, the effective demand for syndicated programs will undergo a sharp rise. The disabilities in program procurement to which independent VHF stations are at present subject would be compounded in terms of the numbers of new UHF stations which come into existence. They of course to succeed would have to maintain commercial viability and would seek competitive parity with network affiliated VHF stations. True competitive parity under present conditions in the economics of national television would require that each new UHF station obtain a primary affiliation with a major television network. However, this does not appear to be feasible under the present three network system. Hence, the ultimate answer for the program procurement problem of nonaffiliated stations must be found in a greatly

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[4] Television Network Program Procurement, House Committee on Interstate and Foreign Commerce, H.R. Rept. No. 281, May 8 1963. (herein after "Harris Report")

[5] Harris Report, at 126-121.

[6]. Id. at 116.

[7] Id. at 104.

> expanded independent syndication industry - an industry which is financially competent to provide risk capital to produce programs of "quality" comparable to those which presently are available for network exhibition. It appears to be urgent that action be taken to encourage a truly competitive climate in the television procurement markets, to permit and foster as rapid an expansion of program production as the rising effective demand from both existing UHF stations and new VHF stations will support.[8]

Accordingly, the Commission's conclusions regarding program distribution evidence a significant concern that "competitive programming" was not being made available to all segments of the television marketplace, especially independent VHF stations. A review of industry sources at the time convinced the Commission that there had been a virtual elimination of the "first run" syndication market comprised of program series "competitive" in quality with network offerings[9]

While it is true that off-network product was available for independent television stations at the time, the critical point is that the off-network programming being supplied was simply not competitive. In other words, "quality" product, i.e. programming yielding significant ratings, was not made available. Indeed, in 1965 the Commission referenced an extensive survey of broadcast stations examining the need for program product. Broadcasting reported the results; 73.5 percent of the stations indicated that there was available a supply of poor quality half hour shows but little or no top quality first run programming.[10] The Commission concluded:

> Formerly, a reasonably broad syndication market was available to television station licensees as the principal alternate source of first-run television programs suitable a "mass appeal" "offerings" competitive with network programs. More recently, due largely to the program activities and practices of network managers in collaboration with "independent" producers, such an alternate program source is no longer available. Under modern program procurement practices, production and procurement of programs for network exhibition and for syndication have become directly related

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[8] Second Interim Report, FCC Office of Network Study, 1965 at 768-769

[9]. Id at 760

[10] Id. at 760-761 n. 8. The Commission cites to a wealth of information regarding the problems with securing top quality programming.

> actities. In large measure they involve the same persons and the same programs. Syndication of series suitable for evening time competition with interconnecting network offerings has become a byproduct of network program production and procurement.[11]

The important point to be grasped is that the networks, acting individually through their program procurement practices, effectively prevented the production and sale of competitive video product.

In 1970, the FCC found that network control over domestic syndication created an inherent conflict of interest:

> Finally, the presence of the networks as domestic syndicators is inherently undesirable. They are in the position of selling programs to independent stations in competition with their own network programs on affiliated stations, and they compete against independent syndicators in the affiliated-station market where they have an advantage due to their permanent relationship with the stations. [12]

For over a decade the Commission and Congress surveyed network program acquisition practices. What should be gleaned from a fair reading of the record, is that the market structure prevented top quality programming – that was competitive to network programming – from reaching independent television stations.

The fact that the networks sold some off-network series to independent stations is largely irrelevant. Sales of such product had little or no competitive impact. [13]

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[11]. Id. at 758.

[12] Report and Order in Docket No. 12782, 23 FCC 2d 382, 394 (1970).

[13] A dialogue between then Commissioner Nicholas Johnson and a representative of the NBC affiliates is instructive:

> MR. KOTEEN: Let me put it this way: There is no objection to the competition, and let's speak specifically to the question of independent television and the manner in which I have just raised it or in the manner in which you raised it.
>
> Independent television stations today are getting a certain program fare. It is not the greatest program fare in the world on any broad base because the network affiliates are getting the best program fare.
>
> COMMISSIONER JOHNSON: Isn't that the point of fact?
>
> MR. KOTEEN: No.

Indeed, Commissioner Cox observed:

> Under the present arrangements, the affiliates skim the cream off the market without even having to bid because they get the network's program and the independent has no choice to even apply for it. [14]

The Commission's actions were not premised on a "potential" harm as so often argued by the networks. Rather it was the recognition that competitive programming alternatives did not exist and the off-network programming that was being made available to independent stations was simply not competitive. Thus, references to the dollar amount of programming sold to independent stations or competing network affiliates, do not address the crucial issue. Programming was not a fungible commodity. Then, as now, television was a hit driven business. Surely there was "something" to fill up the airtime, but it forced independent stations to rely on product that reduced the competitive potential of these stations. It was only until after the rules were adopted that off-network shows such as M*A*S*H entered the market in a timely fashion. As a result, Off-network programming has become an essential element in the economic base of independent television.

Prior to the adoption of the rules, the networks engaged in gross manipulation of the market to prevent top shows from reaching independents. Mr. Jim Victory, former head of domestic syndication for CBS testified before the Commission in 1983 stating:

> I can tell you that before the rules it was standard operating procedure for all three networks syndication arms to offer product to the network owner groups well in advance of the release date....

> COMMISSIONER JOHNSON: If you look at the total programming package and the total television market and you look at the program and you look at the stations and see how they are allocated – <u>in fact, the independent stations which we have been trying to encourage to provide some competition in this industry are left with nothing but the dregs, because, in part, of the domination of the market by the networks</u>.

Testimony before the Federal Communications Commission, Study of Radio and Television Network Broadcasting, July 22, 1969 at 9997-9998.

[14] <u>Id</u>. at 10000.

> Revocation [of the fin-syn rules] would, again, permit preferential treatment, both to the O&O's and for affiliates, severely curtailing program supply available for independent stations, and I wouldn't be a bit surprised to see that a top show like a "M*A*S*H" or WKRP may be fed if the rules are revoked, may be fed by a network to their affiliates. They did it once before, you know, in the mid-60's with the No. 1 show in television, "Gunsmoke", fed Wednesday night 7:30 to 8:00 to all CBS affiliates.[15]

Indeed, it is legend in the industry that popular shows never entered the syndication market until they were no longer on network television.[16] Evidence contained in the FCC's previous record demonstrates that the networks engaged in systematic manipulation of the syndication market.[17]

The issue is not whether any off-network programs appeared on independent television, but rather whether the most popular shows were either unduly withheld from syndication or diverted away from independent stations.[18] The networks "straw

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[15] Jim Victory, NAIPD before the Federal Communication Commission, March 14, 1983 at 242.

[16]. Variety, January 26, 1983 p. 46 reported:

> In another impassioned speech from the floor Jim Victory, who is head of his own distribution firm and was in charge of syndication for CBS when the network had financial control over most of its primetime programs, said that when he tried to get CBS to release into syndication such hit network series as "I Love Lucy", "December Bride" and "Our Miss Brooks", the web refused because it was afraid the simultaneous stripping of the reruns on local stations would torpedo the ratings of the first run telecasts of these shows in primetime.
>
> Victory added that last year CBS tried to stop the September 1982 syndication by Victory's company of "WKRP in Cincinnati" by offering the producer, MTM Productions, a daytime network slot for the reruns. But because CBS has no financial interest in the sitcom, MTM was able to veto the network's request and go ahead with its syndication plans.

[17] Bonanza was not released to Independents by NBC until after its 13 year-network run. Lassie ran on CBS for 10 years, and was off-network for two years before it was allowed into syndication. New York Times, March 18,1983, Letter to the Editor.

[18] In 1983 Mel Blumenthal provided an excellent example of the problem when describing his dealings with CBS for WKRP:

> While WKRP was being cancelled by CBS last season – Arthur Price and I were back in New York truing to convince CBS not to do that, at the very time they were negotiating with us to put the show on daytime stripping on the

man" arguments regarding wholesale warehousing do not address the point.

INTV submits that the motivation to manipulate the market exists to this day.[19] In a now famous 1982 memo to the CBS Network Affiliates Association, James G. Babb, Jr. Chairman of the CBS Television Network Affiliates Association argued why the affiliates should favor repeal of the fin-sin rules:

> If the networks participate in or influence syndication of network programs and have a share in downstream profits, this may impact premature syndication of network re-runs that are being made available to independent stations and are competing with first-run network shows carried by Affiliates.[20]

Mr. Babb is not alone. In 1982 B. Donald Grant, President, CBS entertainment told Hollywood producers that the networks were uneasy when a show appears on independent

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> network because they did not want that show -- even though they felt it wasn't working for them in prime time --did not want that show going into syndication to be competitive with their prime time programming and their affiliate programming in syndication.....
>
> Had they had the distribution rights to that show, had this been prior to the rules, I think I can assure you that WKRP would not be in syndication today. It would be on network stripping daytime.

Testimony of Mel Blumenthal, Committee for Prudent Deregulation before the Federal Communications Commission, March 14, 1983 at 99.

[19] Even with the rules in place, the networks have imposed restrictions on the broadcast of off-network product. The following examples are illustrative.

> Saturday Night Live: The show was withheld from syndication because NBC would not let it run late night. When it was finally put into syndication it was given "simulcast protection, preventing stations from broadcasting the program on Saturday night.
>
> Family Feud: The nighttime syndicated version of the show could not be aired prior to 5:30 in order to protect the networks day time version of the show.
>
> 1974 Match Game: The show was withheld from syndication for two years and when released into syndication it could not be aired prior to 6:00 PM.

Testimony of Ms. Lucy Sulhaney, representing NAPTE, before the Federal communications Commission, March 14, 1983 at 275-276.

[20] Letter from James G. Babb, Jr. to CBS Television Network Affiliates Association, October 18, 1982. A copy of the letter is attached as appendix "A".

television at the same time it appears on the network.[21] Indeed, none other than Larry Tisch, President of CBS has stated:

> ...we commission a program, give it prime-time exposure and promotional support, only to see it go into syndication after five years, to be shown on independent stations in competition with our own offerings? [22]

This sentiment is not confined to the CBS network. Concern over the "competitive independents" has been expressed more recently by ABC executives. A recent article in View Magazine attempted to report on ABC's decision to produce a program for its rival NBC. However, the article also revealed ABC's true intention.

> Most ABC affiliates agree that as long as ABC gets first crack at shows created by the Networks production arm, the deals will be beneficial to the network. ABC's Brochu (manager of business information) confirms that ABC Production's primary function is to produce shows and movies for its own network and "ABC has the first right of refusal" except in cases such as that with NBC, which involve an outside source, the network, coming to ABC with an idea in hand. In such instances, he explains, the production company is free to develop the show without having to get any sort of okay from the head honchos at ABC. Says Lewis Freifeld, VP and general manager of ABC affiliate WTNH-TV New Haven, Conn., "I'd hate to see our network do something that would come back and haunt us.[23]

It is counter intuitive to believe that the economic health of the network will

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[21]. Mr Grant was quoted in Variety, April 27, 1982 as stating:

> Producers should be aware it makes a Network uneasy when a show such as "M*A*S*H*" is on as many as seven times a day in some independent markets as well as on the Network (CBS). It sure doesn't help it.
>
> This is true industry-wide, not just at CBS, the exec commented, noting that other Network series in many instances are also in syndication. (Examples: ABC-TV's "Happy Days" "Laverne & Shirley" "Barney Miller" are in syndie as well as first run on the Network, ditto Little House on the Prairie," CBS's "The Jeffersons" to name just a few.
>
> Because of government regulations involving Networks, Networks are not allowed to have any real say in syndication.

[22] Remarks of Lawrence Tisch, IRTS News Makers Luncheon (October 19, 1988), as cited in the Comments of the Program Producers and Distributors Committee (June 14, 1990) at 20 n. 30

[23] Michael Shapiro, "Playing Hollywood's Game", View, October 23, 1989 at 23-24. Infact, the article noted that ABC's announcement to produce a show for NBC was more a strategic move than substantive news, signaling to Hollywood the networks intent to enter the production business. Id.

not be a significant consideration for network executives when deciding to release into syndication product currently airing on the network.[24] Obligation to the company's shareholders requires them to consider these factors. With network shares declining, there is every incentive to make sure product does not detract from the network. Obviously, network affiliates will not complain if the best off-network product is diverted to them for fringe hours. King World's COO and executive vice president Stephen Pally observed;

> For example, it would be very cumbersome and fraught with conflict for a network to sell a potentially successful off-network show to its affiliate competitor.
>
> A network affiliate body would be "outraged" if a Cosby Show were sold to an indie or to a competing affiliate.[25]

Common sense, as revealed through the statements of network executives and years of government examination of the program marketplace demonstrates that the networks have strong incentives to manipulate the syndication market. When given the power,

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[24] Many believe that "market forces" will result in the immediate release of product and prevent market manipulation. This is naive. Syndication marketing strategies are premised on insuring profitability for the entire enterprise, not just a single program. It may make perfect economic sense to delay (warehouse) or manipulate the sale of product. Paul Kagan stated:

> The timing of a sitcom's release into syndication will become increasingly more important in the 1990's. Several entries may be held back for a year or two in order to avoid competition from stronger series.
>
> Companies like Warner/Lorimar, Columbia and Viacom/Carsey Warner each have several series primed for syndication. This creates the opportunity for using creative selling techniques.

Paul Kagan Associates, Inc., TV Program Stats, December 29, 1989 at pg. 2.

If Hollywood has incentives to manipulate the program market, then allowing the networks to gain control over domestic syndication will exacerbate the problem. The networks will not only be concerned with competition from other syndicators but they also will have a unique concern over competition to network offerings from independent stations. There is absolutely no record evidence to demonstrate that the networks will not successfully engage in such market manipulation.

[25] Television Radio Age, October 2, 1989 at 36.

they successfully limited the availability of timely, top quality product to competitors. While the networks' shares have declined, their power remains. Mr. Tisch said it best in 1989 in a speech before the production community as reported by Variety:

> Do not forget that, while your enjoy the seduction of these new forms of distribution, it is the three networks that put almost $4 billion dollars annually into the creative community. The new players may damage the network's ability to finance Hollywood production, but none can or will replace the webs as a "leading purchaser of your product. [26]

To believe that the networks would not engage in aggressive anti-competitive behavior ignores history as well as present intent.

Even though there have been substantial changes in the telecommunications market place, the potential for steering of product away from independent stations presents a real and present danger. Assuming the Commission wishes to retain a broadcast market that includes independent television stations and independent producers, then it should adopt a policy that stimulates this sector of the market. Giving the networks control over domestic syndication, both for off-network and first run product, is precisely wrong policy choice. The past two decades proved that access to top off-network programming gives independent stations the economic base to finance and purchase top quality first run product.

It would be ironic for the Commission, having almost achieved its goal, to alter its course and shift its policy. INTV believes that the independent television market is at a cross-roads. Independence from network syndicators is essential for the survival of the sector of the broadcast industry. It would be contrary to the public interest to return independent television to the position it occupied prior to the enactment of the financial interest and syndication rules.

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[26] Variety, April 12, 1989 at. 20.